STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 98-309

October 7, 1998

MARY-ANN MACMASTER, ET AL v.
GARDINER WATER DISTRICT
Complaint Requesting Commission
Investigation of the Sale of
the New Mills Dam

PRELIMINARY
EXAMINER'S REPORT

NOTE: This Report contains the preliminary recommendation of the Hearing Examiner. Although it is in the form of a draft of a Commission Order, it does not constitute Commission action. Parties may file responses to this Preliminary Report or raise additional issues by filing a Brief on or before **Friday, October 16, 1998.**

I. SUMMARY

In this Order, we find that the Gardiner Water District's actions in attempting to accept Mr. George Trask's offer to assume ownership of the New Mills Dam are void. We also find that any transfer of the New Mills Dam is subject to the procedural and substantive requirements of 35-A M.R.S.A. § 6109 and Chapter 691 of the Commission's Rules. Pursuant to those provisions, if the Gardiner Water District chooses to act on an offer to purchase the New Mills Dam made by Mr. George Trask or any other individual or entity, it must offer the City of Gardiner the right of first refusal to purchase the Dam on the same terms and conditions.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On April 15, 1998, the Commission received a complaint against the Gardiner Water District (District) signed by Mary-Ann MacMaster and 17 other persons (Complainants). The complaint, filed pursuant to 35-A M.R.S.A. § 1302, requests that the Commission investigate several issues regarding the proposed sale of the New Mills Dam, currently owned by the District.

The New Mills Dam is located in the City of Gardiner along Cobbossee Stream. The water held back by the Dam creates Pleasant Pond, which is abutted by four municipalities: the City of Gardiner, and the towns of Litchfield, West Gardiner and Richmond (the four municipalities). The Dam was built in the 1840's to power a mill that was then alongside the Dam. The Dam was later owned by the City of Gardiner until the District obtained it in 1974. The District used the impoundment of the Dam as a water source until the 1950's, when the construction of the Maine Turnpike impaired the water quality and the District switched to two drilled wells for its water supply. In 1982, the District constructed a hydroelectric facility at the Dam and entered into a power purchase agreement with Central Maine Power Company pursuant to the Public Utilities Regulatory Policy Act. Operation of the hydroelectric facilities ceased in 1994 when CMP bought out the remaining term of the agreement.

Since the contract buyout, the sole purpose of the Dam has been to maintain the water levels established by the Cobbossee Watershed District. Because of the continuing maintenance expenses associated with the Dam and disputes concerning water flows in Cobbossee Stream, the District decided to terminate its ownership of the Dam. On October 2, 1997, the District filed a petition with the Maine Department of Environmental Protection (DEP) to abandon the New Mills Dam, pursuant to 38 M.R.S.A. §§ 901-908 (the Dam Abandonment Act). This petition triggered a statutorily-prescribed 180-day period, expiring on March 31, 1998, during which persons willing to accept ownership of the Dam were sought. The District has asserted that it hoped that some party would surface during the dam abandonment process who would be willing to assume ownership of the Dam. By October 15, 1997, the District became aware that the four municipalities were considering the formation of an interlocal agreement to acquire the Dam. However, the municipalities apparently failed to meet the time deadlines prescribed by the Dam Abandonment Act. In January 1998, the four municipalities asked the District to withdraw its petition with the DEP to permit additional time for the creation of the necessary interlocal agreement. By letter dated February 2, 1998, the District declined to do so out of concern over the continued operation and maintenance expenses associated with the Dam.

Legislation was then introduced to permit affected municipalities to obtain a 180-day extension of the time period. District Trustee John Pulis spoke in opposition to the proposed legislation, indicating that an extension should be permitted only if the District's ratepayers were compensated for the ongoing maintenance costs incurred during an extension. After the legislative hearing, the Mayor of Gardiner, Brian Rines, announced that he would not reappoint Jack Pulis as a trustee of the Gardiner Water District when Mr. Pulis's term expired. In response, Gardiner city councilor George Trask attempted unsuccessfully to build support on the Council for Mr. Pulis's reappointment. At least partly as a result of Mr. Pulis's testimony before the Legislature, Mayor Rines successfully opposed the reappointment of Mr. Pulis. The legislation was nonetheless enacted, but the four municipalities never exercised their right to obtain an extension.

Shortly before the 180-day period was to expire, Mr. Trask notified the District that he was willing to assume ownership of the New Mills Dam. Although the four municipalities had previously indicated that they would accept the Dam if no other person stepped forward, no party other than Mr. Trask had definitively stated that it desired to own the Dam. After receiving Mr. Trask's offer, the District trustees held an

emergency meeting on Sunday, March 29, 1998, at which two of the District's three trustees were present (including Mr. Pulis, whose term was to expire soon thereafter). At this meeting, the trustees voted to accept Mr. Trask's offer and transfer the Dam to Mr. Trask.[1] Because a new owner had been found, the District's DEP petition was withdrawn on March 31, 1998.[2]

The Complainants' petition sought to have the Commission initiate an investigation into the circumstances of the proposed transfer. As required by statute, the Gardiner Water District responded to the Complainants' allegations on April 28, 1998, arguing that its actions leading to the agreement to transfer the New Mills Dam to George Trask were reasonable and in compliance with all applicable laws. On May 27, 1998, the Commission issued its Order Initiating Investigation, and opened this proceeding. Several procedural conferences were held and a technical conference was held on August 6, 1998, at which former trustee Jack Pulis and the parties were available to discuss the facts of the case and answer questions. The parties waived a hearing in this case and stipulated that the transcript from the technical conference would be admitted in the record. This Preliminary Examiner's Report followed.[3]

[1]The vote was subsequently ratified by the full Board of Trustees on April 15, 1998.

[2]Notwithstanding these actions, the District voluntarily delayed actual legal transfer of the Dam to Mr. Trask pending the outcome of this proceeding.

[3]Due to uncertainty regarding the legal issues in this case and the evidentiary record, the Advisory Staff agreed to issue a

III. ANALYSIS

The Petitioners have raised several issues regarding the proposed transfer of the New Mills Dam. In addition, the Commission's Advisory Staff identified two additional issues. Each of these issues is addressed separately below.

A. Was the Gardiner Water District under any obligation to notify the public of the March 29th trustee meeting and vote?

The Petitioners have asked whether the District was required to provide public notice of its March 29, 1998 trustee meeting. At this meeting, the trustees voted to accept Mr. Trask's offer to assume ownership of the New Mills Dam. The March 29th meeting had originally been scheduled as a work session to discuss various matters, including District efforts to respond to what it perceived to be "misleading publicity" regarding the dam abandonment process. Tr. C-35-36 & C-43. After the meeting had been scheduled and noticed, but before the meeting was held, the District received Mr. Trask's offer on Friday, March 27th. Tr. C-128-129. At the direction of Trustee Jack Pulis, the agenda for the March 29th meeting was amended to include consideration of Mr. Trask's offer.[4] The issue was

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Preliminary Examiner's Report before briefing to provide guidance to parties on these questions.

[4]Although Mr. Pulis described the meeting in his testimony as an informal "work session," the agenda for the meeting appears to indicate that it was a more typical Board of Trustees meeting. ODR 1. In either event, the public should have been notified of the meeting as required by the Freedom of Access Law; the record

raised at the March 29th meeting because a quorum of trustees would not be available again until after the expiration of the March 31st dam abandonment deadline.[5] Tr. C-64. Although the Board members were notified of the agenda change by Tom Hayden, the District Superintendent, no further public notice was given of the amendment to the agenda. Mr. Trask also appeared at the March 29th meeting although he stated that he was unaware that his offer would be acted upon at that meeting. Tr. C-174.

As a quasi-municipal entity, the District is bound by the provisions of Maine's Freedom of Access Law, 1 M.R.S.A. §§ 401-410. Section 406 requires that public notice be given for all public meetings of the Board of Trustees. In addition, the statute specifically addresses "emergency" meetings such as the change to the March 29th meeting agenda. In such a case, the agency must notify local representatives of the media, "whenever practical," by the same means used to notify the trustees. Despite the fact that the District was aware of the agenda change by Friday afternoon (March 27th) and trustees were notified by telephone (Tr. C-143), no effort was made to notify local media representatives in a similar manner. This is true despite the fact that the District was well aware that the District's plans for the New Mills Dam were the subject of local media coverage; is unclear whether the original meeting was publicly advertised.

[5]One trustee, Lynn Girard, was out of the state on March 29th and a second, Roger Gregoire, was scheduled to leave the State for business reasons during the following week.

that coverage was, in fact, the original reason for calling the March 29th meeting. Under these facts, it is apparent that a violation of the Freedom of Access Law occurred.

This Commission does not, however, have direct jurisdiction to enforce the requirements of the Freedom of Access Law as it may apply to publicly-owned utilities. Furthermore, we need not address the issue of whether such a utility's violation of the Freedom of Access Law would require this Commission to find the utility's actions to be an "unreasonable act" within the meaning of 35-A M.R.S.A. § 301. It is uncontested that the Board of Trustees subsequently met on April 15, 1998, with all three trustees[6] present and ratified the vote taken on March 29th to transfer the Dam to Mr. Trask. No party has suggested that the April 15th meeting was not conducted in full compliance with the Freedom of Access Law. The subsequent vote, therefore, "cures" any ill effects of the March 29th actions. The District is cautioned, however, that the better approach is to follow the requirements of the Freedom of Access Law in the first place. Sufficient time existed to telephone local media representatives in this case and that effort should have been undertaken, particularly when the District knew that there was active public interest in this issue. Aside from complying with the law, such

[6]Since this meeting occurred after the expiration of Mr. Pulis's term, the three trustees were Lynn Girard, Roger Gregoire and Mr. Pulis's successor.

an approach has the additional benefit of allaying public fears that some type of "back-room" deal has occurred outside of public scrutiny.

B. Was the March 29th vote illegal?

Much of the previous discussion can be similarly applied to the issue of whether the March 29th vote was legal. In addition to the lack of public notice discussed above, the District failed to provide written notice of the meeting to its trustees, as required by the District's bylaws.[7] Noncompliance with technical meeting requirements can threaten the validity of actions taken at such a meeting. See 1 M.R.S.A. § 409(2). Once again, however, we need not decide whether the March 29th vote was effective action by the District since the actions were ratified through the subsequent April 15th vote. Nonetheless, the same cautions expressed above apply equally to this issue. In the future, the District should follow all technical meeting requirements to avoid future challenges to actions taken by the trustees.

C. Can these circumstances (surrounding the March 29th trustee meeting and vote) be considered an "unreasonable act" by the Gardiner Water District

This issue is addressed by the preceding discussions.

[7]Article I, Section 3, of the District's bylaws requires that each trustee receive written notice in hand at least 24 hours before a meeting of the Board of Trustees.

D. Did the Gardiner Water District have any obligation to wait until April 6, 1998 (the date specified in a letter sent to the four municipalities) before agreeing to transfer ownership of the Dam to anyone other than the four municipalities?

On March 6, 1998, the District sent a letter to persons that it believed might be interested in owning the New Mills Dam. See District Response to Complaint, Exh. 15. The letter states that as of April 6, 1998, the Maine DEP will "take charge" of the petition and seek to determine if any State agency would be willing to accept ownership of the Dam. If no agency accepted the Dam, the letter states that notice will be provided to affected communities and if an owner is still not found, the DEP will order the release of the waters impounded by the Dam. The letter closes by asking each person to contact the District before April 6, 1998 if he or she is interested in owning the Dam. Unbeknownst to the District at the time it sent the letter, the actual expiration of the statutory 180-day period was March 31, 1998, not April 6, 1998. This clarification was made in a letter dated March 19, 1998 from Dana Murch of the DEP to the District with copies to each of the four municipalities and State Senator Sharon Treat. Tr. C-48. The District made no effort to notify other parties of the change in the date stated in the March 6th letter.

The Petitioners have asked whether the District was obligated to wait until April 6, 1998 before agreeing to transfer

the Dam to any person other than the four municipalities. It is unclear what legal restriction may have operated to create such a limitation on the District. Clearly, the March 6th letter was insufficient to create a contractual option right in the four municipalities or any other party. It is possible that some parties may argue that the District should be equitably estopped from taking action on the Dam until the April 6th date, since parties who did not receive Dana Murch's letter lacked notice of the date change and could reasonably have relied upon the April 6th date.[8] This argument is answered by the Law Court's decision in *Families United of Washington County v. Comm'r., Department of Mental Health and Mental Retardation*, 617 A.2d 205 (Me. 1992). In short, absent a finding that an agency deliberately intended to mislead a party, estoppel will not lie against a public entity for innocent misrepresentations where a statute clearly establishes a contrary result. Here, the Dam Abandonment Act established the duration of the 180-day period. No party has suggested that the incorrect date described in the letter was intentional or designed to mislead Petitioners.

In hindsight, the District probably should have attempted to notify the parties of the changed date. The District had, on its own volition, sent the March 6th letter to persons that it believed might be interested in obtaining the

[8]The four towns would not be able to sustain an equitable estoppel argument in any event since they received actual notice of the changed deadline by copy of Mr. Murch's letter.

Dam. The District was aware of which of those persons had been copied with Mr. Murch's letter. Although it would have been preferable for the District to notify those interested persons who did not receive a copy of Mr. Murch's letter, it is understandable that such action was not taken given the confusion regarding the effect of the expiration of the 180-day deadline and the existence of subsequent opportunities pursuant to the Dam Abandonment Act to express an interest in obtaining the Dam. The record demonstrates that many of the parties were playing a waiting game to see if someone else would step forward and take the Dam. Although the District might have been more proactive in notifying parties, it was under no legal obligation to do so. We find that the District was not obligated to withhold action on transferring the Dam until April 6, 1998.

E. Is the Gardiner Water District under any obligation to give the four municipalities first refusal on the Dam?

There is no general requirement that utilities offer a right of first refusal on utility property to municipalities or any other entity. A limited right of first refusal is granted to municipalities by 35-A M.R.S.A. § 6109 for land or property owned by a consumer-owned water utility for the purposes of "providing a source of supply, storing water or protecting sources of supply or water storage." On first blush, it appears that the present case falls squarely within the terms of the statute since the New Mills Dam is certainly "land or property" that stores water. The

issue is complicated, however, by Chapter 691 of the Commission's Rules.

Chapter 691 of the Commission's Rules implements 35-A M.R.S.A. § 6109.[9] Chapter 691 provides the following definition of "water resource land" subject to the rule's provisions.

> "Water resource land" means any land or real property owned by a water utility for the purposes of providing a source of supply, storing water or protecting sources of supply or water storage, including reservoirs, lakes, ponds, rivers or streams, wetlands and watershed areas, **and contains greater than five contiguous acres**. "Water resource land" does not include any land on which a utility has built a facility that is used exclusively for storing water as part of that utility's transmission and distribution system.

Chapter 691, Section 1(E) (emphasis added). The Rule, in effect, has adopted a five acre *de minimis* exception to the statutory requirement that a right of first refusal be given to adjoining municipalities.

The District has indicated that the Dam itself, the property on which it sits, and the area included within two easements granted for access and egress to and from the Dam total only 0.71 acres. Bench Data Request 1-02. Therefore, the District believes that the proposed transfer of the Dam and the associated easements qualifies for the *de minimis* exception

[9]The Commission's adoption of Chapter 691 was specifically authorized by 35-A M.R.S.A. § 6109(4).

provided in Chapter 691. This analysis, however, neglects to consider the fact that the District also proposes to transfer any water rights that it may possess and that accompany operation of the Dam in the Cobbossee Stream. See District Exh. #3.

The initial question presented by consideration of potential water rights is whether these interests should be considered "land or property" within the meaning of the statute or rule. The right to flood the land of another has generally been treated under the law as an easement appurtenant to land. That is, it represents the right of the owner of the land upon which the dam sits (the dominant estate) to flood the land of another (the subservient estate). This easement is appurtenant because it is tied to ownership of the land upon which the dam is located; the owner has no rights to flood lands apart from his or her ownership of the land upon which the dam is located. An easement appurtenant is considered to be a property interest and clearly falls within the plain meaning of the term "land or property" as used in the statute and rule.

Even if we were to find that the Legislature's intent regarding this type of property interest were ambiguous, the statutory purpose supports the same result. See *Arsenault v. Crossman*, 696 A.2d 418, 421 (Me. 1996), where statutory language is ambiguous, courts look at policy behind enactment. The

purpose of Section 6109 was to offer members of the public an opportunity to preserve public rights in land or property that affected the public use of bodies of water. For example, if a consumer-owned utility was offering to sell an undeveloped parcel of land abutting a waterway, the Legislature deemed that the public should have a voice in whether it wanted to retain the parcel in the public trust or allow it to be transferred to a private developer. The same purpose is implicated if we assume that a consumer-owned utility wanted to sell a conservation easement it owned on waterfront property. The same public interest is affected and, presumably, the Legislature would have intended that the same opportunity be provided to the members of the public. In the present case, transfer of the dam and its associated flowage rights could have a dramatic effect on the public's use and enjoyment of Pleasant Pond. Even though Mr. Trask has stated that he intends to maintain the Dam's operation (Tr. C-161), the concern sought to be addressed by the Legislature is not whether a private entity will misuse the property but whether the public wants to retain its own rights in the property. That issue is assuredly raised by the District's proposed transfer of flowage rights and falls within the ambit of Section 6109.

Having found that flowage rights are "property" for purposes of the statute and rule, the next question is whether

the District possesses any flowage rights in connection with the New Mills Dam. The District itself was not helpful on this subject, indicating that it was unaware of what flowage rights, if any, it possessed and would simply quitclaim whatever rights it may possess when it transferred the Dam.

The fact remains, however, that the District is the owner of a dam that impounds a substantial amount of water flooding a substantial amount of land owned by others. In evaluating the District's rights in this regard, we examine three alternatives. First, the District may have acquired flowage rights under the Mill Act, 38 M.R.S.A. §§ 651-59, 701-28. The Mill Act is an ancient Maine statute originally intended to aid in the development of mills along the streams and rivers of the state. It authorized the construction of mills in derogation of common-law riparian rights,[10] permitting the mill owners to flood the upstream property. The Law Court has held that the Mill Act created an easement appurtenant in the mill land to allow the flooding of the upstream lands. See *Dorey v. Estate of Spicer*, 1998 ME 202, 715 A.2d 182 (Me. 1998), citing *Opinion of the Justices*, 118 Me. 503, 507, 106 A. 865, 869 (1920). The New Mills Dam was built in the 1840's for the purpose of powering an associated mill. Tr. C-143. As such, it is very possible that

[10]Riparian rights are the rights held by the owners of the land abutting a stream or other waterway to the use of that water.

the District retains the flowage rights originally granted by the Mill Act.

Alternatively, the District may possess deeded flowage rights. See *e.g., Bennett v. Kennebec Fibre Co.*, 87 Me. 162, 32 A. 800 (1895). The District indicated that its deeded rights stretch back many years and involve numerous deeds, many of which are difficult to decipher. Nonetheless, it is possible that the District does have deeded flowage rights.

Finally, even if the District did not have legal rights to flood upstream land either through the Mill Act or by written instruments, it has long since obtained those rights by prescription. The elements of a prescriptive easement are that the adverse use be maintained without interruption for 20 years. See 14 M.R.S.A. § 812 and *Foster v. Sebago Improvement Co.*, 100 Me. 196, 60 A. 894 (1905), citing *Underwood v. North Wayne Scythe Co.*, 41 Me. 291. Clearly, the District and its predecessors have maintained the flooding of land sufficient to establish a prescriptive easement over the lands submerged by the Dam's impoundment.

Ultimately, we need not determine the precise nature and source of the District's flowage rights. The very fact that the District and its predecessors have maintained the water

levels for such a prolonged period of time establishes that some rights exist. We are satisfied that the District possesses a legal right to flood the land submerged under Pleasant Pond and that it intends to transfer that right with the New Mills Dam.

The final question regarding the application of Section 6109 and Chapter 691 is whether the property to be transferred exceeds five acres in area. As stated above, the actual land upon which the Dam sits is 0.71 acres. Consideration of the flowage rights raises additional issues since the District's survey does not include the area of flowage rights. Testimony was provided to indicate that Pleasant Pond's surface area (748 acres) would be reduced by more than 1/2 if the Dam were to be breached. MacMaster Exh. #1,#2 & #5. This provides evidence to indicate that the Dam's flowage rights (which must be coextensive with the area of the land submerged through operation of the Dam) easily exceed the five-acre threshold. Additional evidence is presented in Appendix A, which analyzes the extent of flooding due to the New Mills Dam under the most conservative assumptions. Even with such assumptions, the area still exceeds the five-acre threshold. For these reasons, we find that the property proposed to be transferred by the District meets the qualifications for application of Section 6109 and Chapter 691.

Before we can find whether Section 6109 governs the present transaction, however, we must also consider the potential application of the Dam Abandonment Act. It could be argued that once a utility begins proceedings under the Dam Abandonment Act, the provisions of that Act take precedence over conflicting provisions of Section 6109. Since the Dam Abandonment Act does not provide a right of first refusal to municipalities, it could be argued that no such rights exist in the four municipalities in the present case.

We do not believe that the two enactments are irreconcilable. Both statutes express a preference for providing every opportunity to continue the use of the subject properties to ensure continuing public benefits: Section 6109 provides for the right of first refusal and customer approval of water resource land transfers; the Dam Abandonment Act requires the owner to determine if any other entity will assume ownership, including local municipalities and public agencies of State Government. We must attempt to find a harmonious construction of the two statutes that advances the Legislative intent to preserve public advantages in water bodies. *Cf. Lucas v. E.A. Buschmann, Inc.*, 656 A.2d 1193 (1995), holding that separate statutory provisions must be read harmoniously in the context of the overall statutory scheme.

We find that the best construction of the interplay between the two statutes permits a consumer-owned utility to pursue the dam abandonment process, but if it finds an entity that wishes to accept ownership of the dam, it must first provide the offer of first refusal to adjoining municipalities and follow the procedural steps of Chapter 691 (if the 5-acre threshold is met). This interpretation advances the purposes of both statutes by requiring the utility to search for a new owner of a dam and to provide the public with the last opportunity to preserve its public rights associated with the dam. In addition, this approach follows the maxim of statutory interpretation that the more specific governs the general. See *In re McLoon Oil Co*., 565 A.2d 997, 1008 (Me. 1989). Section 6109 is more specific in that it applies only to consumer-owned water utilities; the Dam Abandonment Act applies to *any* entity that seeks to breach a dam.

This distinction may also explain why the Dam Abandonment Act does not grant first refusal rights to abutting municipalities. If the State attempted to require a private entity to grant a right of first refusal to a municipality, that action would almost certainly be an unconstitutional taking of private property. No similar problem arises when the dam is owned by a public entity, such as a consumer-owned water utility. Viewed against this backdrop, it is not unexpected that the Dam Abandonment Act does not grant a right of first refusal, but that

omission should not be read to indicate a Legislative intent that the right granted by Section 6109 is extinguished if the water resource land in question happens to be a dam subject to an abandonment petition.

As counsel for the District conceded (Tr. C-49-50), the Dam Abandonment Act seeks to identify entities that wish to assume ownership of a dam, but if more than one entity seeks to obtain a dam, it does not give any guidance as to which of the competing entities should be selected to receive the dam. Section 6109 fills that gap in the Dam Abandonment Act by specifying that if the dam is owned by a consumer-owned water utility, the local municipality has the right of first refusal.

Therefore, we find that the District's proposed transfer of the New Mills Dam is subject to Section 6109 and Chapter 691. This finding, however, raises yet another question -- which municipality is afforded the right of first refusal to which property interest? Section 6109(5) provides that "[t]he municipality in which the land is located shall have the right of first refusal to purchase any land that lies within that municipality's boundaries." In this regard it must be remembered that the flowage rights do not exist in the submerged land, but are appurtenant to the land on which the Dam sits. "[A]n easement that is appurtenant is incapable of existence separate

and apart from the particular messuage or land to which it is annexed, there being nothing for it to rest upon," *Ring v. Walker*, 87 Me. 550, 558, 33 A. 174, 176 (1895). Stated another way, the District is not proposing to transfer any interest in property located in any municipality other than the rights that exist in the New Mills Dam lot itself, including the flowage rights. Therefore, the statutory right of first refusal is possessed solely by the City of Gardiner. The statute also provides, however, that the right of first refusal is assignable by the municipality, 35-A M.R.S.A. 6109(5). It would therefore be within its rights for the City of Gardiner to exercise its right separately or in concert with the other municipalities affected by the New Mills Dam.

F. Can the agreement between the Gardiner Water District and Councilor Trask be investigated to ensure that it is in the best interest of the public?

The Complainants have asked this Commission to review the terms of the agreement to transfer the Dam to Mr. Trask and to determine whether that agreement is in the public interest. Although we find that the Commission has limited jurisdiction to review the agreement's terms to ensure that the District Trustees acted reasonably and prudently on behalf of the District's customers, we must decline to undertake the wider review sought by Petitioners in this case.

The Legislature has granted this Commission broad powers to regulate public utilities, but those powers are specifically to be exercised to "assure safe, reasonable and adequate [utility] service." 35-A M.R.S.A. § 101. It is true that our authority and applicable standards are often described in very general terms, *e.g.* utilities must furnish "safe, reasonable and adequate facilities and service" (35-A M.R.S.A. § 301) and Commission must determine generating facility or transmission line to be justified by "public convenience and necessity" (35-A M.R.S.A. § 3132). Although the precise boundary of our powers may be nebulous, the Commission's focus in exercising those powers is narrowly drawn. We must examine a public utility's actions to determine whether their effect on utility customers and utility shareholders is reasonable.

In short, absent specific statutory authorization, the Commission may not employ its broad authority to regulate utilities to review utility actions to determine if, in our opinion, the general public good has been served. Therefore, we decline to consider issues such as whether the District should have considered the needs of shorefront property owners or public users of Pleasant Pond when determining what action to take on the Dam. Our review is limited to whether the District properly considered the needs of its customers, and that analysis is undertaken in Section H below.

G. Does the Gardiner Water District require Commission approval under 35-A M.R.S.A. § 1101 to transfer the Dam?

Title 35-A, Section 1101 requires a utility to obtain Commission approval before transferring any "property that is necessary or useful in the performance of its duties." The District has suggested that since it no longer uses the Dam impoundment as a water source, the property does not serve any useful purpose in fulfilling the District's duties and, therefore, Commission approval of the Dam transfer is not required under Section 1101.

In the course of this proceeding, the Commission Staff pursued the issue of whether the Dam and its impoundment might serve some use as a back-up source of water for the District. Initially, the District suggested that it has arranged for the Hallowell Water District to provide a back-up supply through an interconnection with the District. District Response to Complaint at 2, nt. 1. It subsequently became apparent that this source is limited geographically and in scope. Bench Data Request 1-08. The District then suggested that each of its two wells serves as a back-up supply for the other should one well fail for any reason. Tr. C-100. It appears, however, that the wells are located fairly close to each other and if contamination were to occur, it could possibly affect both wells. Finally, the

District noted that when its new treatment plant is completed, the District will no longer have inputs located in Cobbossee Stream. Tr. C-145.

None of the District's answers have inspired confidence in the District's ability to quickly provide a suitable back-up water supply in an emergency where both of its wells were made unavailable to it. Mr. Trask indicated, however, that he would be willing to stipulate that the District could retain its rights to draw water from the Cobbossee Stream after any transfer of the Dam. Tr. C-139-140. This stipulation obviates the need for further investigation into whether the proposed transfer would hinder the District's ability to provide a back-up water supply. Although the District's future plans are not before us in this case, unless the District is prepared to offer a suitable alternative, the District would be well advised to maintain their current ability to use the stream as a back-up supply. Nonetheless, we find that given Mr. Trask's stipulation to permit continued use of the stream as an emergency water source, the Dam would not be necessary or useful to the District's operations for purposes of section 1101 if the proposed transfer to Mr. Trask were to occur. The District should take care to explicitly reserve such rights in any transfer of the Dam that may occur after the issuance of this Order.

H. Has the Gardiner Water District made reasonable efforts to capture any fair value that the Dam may retain?

As discussed above, our review of the details of the proposed transfer is limited to ensuring that the District Trustees acted reasonably and prudently in agreeing to transfer the Dam to Mr. Trask. However, given our finding above that the District must offer a right of first refusal to the City of Gardiner and the uncertainty as to whether Mr. Trask's offer will remain on the table, we need not definitively address at this point whether the terms of the present agreement are reasonable and prudent. If the Dam is ultimately transferred to a public entity, this issue becomes moot. The statute that grants the right of first refusal to municipalities also specifically authorizes a consumer-owned water utility to sell property to public entities at below market value; the Commission is expressly forbidden to find such a transfer unreasonable or imprudent on account of the sale price. 35-A M.R.S.A. § 6109(3).

Because it is possible, however, that the City of Gardiner may not exercise its option, we will discuss briefly the issues surrounding the terms of the proposed sale to Mr. Trask. The District has agreed to transfer the Dam to Mr. Trask for $1.00. Tr. C-11 & C-88. Although this proposal involves obviously nominal consideration, it does not appear to be unreasonable or imprudent given the unique circumstances of this case.

First, it is undisputed that the District has expended considerable sums to maintain the Dam in recent years. District Response to Complaint, Exh. 4. It is reasonable to assume that a piece of property into which so much money has been invested should retain some value. Second, the mere presence of and interest expressed by upstream property owners further indicates that the Dam has considerable value to them as property owners; a disruption in the maintenance of water levels in Pleasant Pond would have a serious deleterious effect on their lifestyle and property values. Finally, the public recreation opportunities afforded by Pleasant Pond also appear to have value to the users of the Pond.

The unusual crux of this case is that although the Dam creates value for many individuals, it appears to be very difficult to capture that value. Mr. Trask has agreed to assume ownership of the Dam on the basis that he *may* be able to obtain contributions toward Dam maintenance from those persons benefited by the Dam. He *hopes* to be able to secure sufficient contributions to defer his associated expenses and provide some profit on his investment. Tr. C-76-78. Mr. Trask has no guarantee of success, however; as he admitted, he cannot force anyone to make contributions for his efforts. Tr. C-160-165. In fact, the lack of other entrepreneurs seeking to obtain the Dam

for similar purposes reflects either the difficulty of Mr. Trask's task or his unique foresight.[11] In either event, it is apparent that his business plan involves a high-risk strategy for obtaining a return. It is difficult to place a high value on such a risky opportunity.

Second, the District did engage in some efforts to sell the Dam. It inquired of Synergics Energy Development Company as to whether it would be interested in purchasing the Dam and its associated hydroelectric facilities. On April 8, 1998, Synergics responded that it was not interested. District Exh. #4. Mr. John Bogert, who oversees the operation of the CHI hydroelectric facilities downstream in Gardiner, also indicated that the Dam would be unlikely to have additional value to anyone who wished to operate the District's hydroelectric facility, other than to avoid the deleterious operation of the Dam by another purchaser. Tr. C-192, C-195-196. Again, such limited utility is unlikely to fetch a high price.

Therefore, it appears that the terms of the proposed transfer to Mr. Trask would be upheld as reasonable and prudent. However, an ancillary benefit of a municipality possessing a right of first refusal is to provide an incentive for Mr. Trask (and any other interested person) to maximize his payment for the

[11]Although the Petitioners and Ms. Glenna Nowell (City Manager of Gardiner) asserted that the municipalities were interested in ownership of the Dam, no party could affirmatively state that *anyone* other than Mr. Trask was prepared at this time to assume ownership of the Dam. Tr. C-207-209.

Dam so as to make the municipality's exercise of its option less likely. If the Dam does have value to someone, that value should be maximized by having a municipal "competitor" for the purchase of the Dam.

IV. CONCLUSION

In addition to our analysis above, we wish to add some closing comments regarding the District's actions in this matter. Although we overturn the District's attempt to transfer the New Mills Dam to Mr. Trask, we wish to emphasize that we have discovered no evidence that the Trustees or any other person had anything other than honest motives in structuring and pursuing the proposed transaction. Although the process employed by the District was less than precise and failed to follow the letter of the law, we believe that these failures were the result of inattention to certain requirements and an understandable rush to comply with vaguely understood deadlines established in the Dam Abandonment Act. It is unfortunate but understandable that this failure in process has led some to question the motivations and practices of the District in this circumstance. We hope that the process afforded in this proceeding has helped to dispel these questions and provide guidance to the District in how to handle any similar matters in the future to promote public confidence in the conduct of its business.

Finally, to clarify the impact of our decision in this case, we here summarize the present status of the New Mills Dam. The Trustees' actions in attempting to accept Mr. Trask's offer to purchase the New Mills Dam are void due to the failure to follow the procedures of 35-A M.R.S.A. § 6109 and Chapter 691 of the Commission's Rules. It is up to Mr. Trask to determine whether his offer to purchase the Dam still stands, on its original terms or as modified if he chooses. In either case, the District must follow the procedures outlined in Chapter 691 of our Rules, except that the Commission waives the notice requirements of Section 2 of Chapter 691 since all parties are on notice regarding the District's desire to relinquish its ownership of the Dam. If the District receives any offer to acquire the Dam, the District must offer to transfer the Dam to the City of Gardiner on the same terms as any other offer acceptable to the Trustees. The City of Gardiner is free to exercise its right of first refusal alone or in concert with the other affected municipalities, or to transfer its right to any other party. Under Chapter 691, the City of Gardiner will have 90 days from the presentation of an offer to it to decide whether to exercise its right of first refusal. If Mr. Trask withdraws his offer and the District receives no other offers, the District is free to pursue its option to seek authority to breach the Dam.

Accordingly, we

O R D E R

1. That the actions of the Gardiner Water District Board of Trustees in purporting to accept the offer of Mr. George Trask to purchase the New Mills Dam are void;

2. That any transfer of the New Mills Dam is subject to the procedural and substantive requirements of 35-A M.R.S.A. § 6109 and Chapter 691 of the Commission's Rules, except that application of Section 2 of Chapter 691 is waived; and

3. That if the Gardiner Water District chooses to act on an offer to purchase the New Mills Dam from Mr. George Trask or any other individual or entity, it must offer the City of Gardiner the right of first refusal to purchase the Dam on the same terms and conditions.

Dated: October 7, 1998 Respectfully submitted,

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Gilbert W. Brewer
Hearing Examiner